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NO. 89 - 5809

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF

CATHERINE HANCOCK
Counsel of Record
ELIZABETH W. COLE
7031 Freret Street
New Orleans, Louisiana 70118
(504) 865-5949; 865-5153

Counsel for Petitioner

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In his Petition for Certiorari, Robert Sawyer sought this Court's review of his case on the grounds that the Fifth Circuit En Banc majority's ruling below presents two substantial and unresolved questions: Whether the rule of Caldwell v. Mississippi is retroactive, either because it is not a "new" rule under Teague v. Lane and Penry v. Lynaugh, or because it involves a "bedrock" procedure that falls within Teague's fundamental fairness category of retroactive "new" rules. Caldwell, 472 U.S. 320 (1985); Teague, 109 S. Ct. 1060 (1989); Penry, 109 S. Ct. 2934 (1989). After the Tenth Circuit ruled unanimously En Banc that Caldwell falls within Teague's fundamental fairness category, Robert Sawyer filed a supplemental brief seeking this Court's review on the additional ground that the Fifth Circuit majority's ruling denying Caldwell retroactive effect is now in conflict with the Tenth Circuit's ruling granting retroactive effect. Compare Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc) with Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc).

The State has two chief responses to Robert Sawyer's claims concerning the need for this Court's review of his case, and both responses are based on incorrect readings of precedents in the lower courts. First, the State argues that the Fifth, Tenth and Eleventh

Circuits are in agreement that Caldwell is a "new" rule under Teague, when the Eleventh Circuit has never so held, and when both the Eleventh and the Sixth Circuits continue to entertain retroactive Caldwell claims on the merits in the post-Teague era. Second, the State argues that despite the explicit conflict between the Fifth Circuit and the Tenth Circuit concerning Caldwell's retroactivity, this Court's review is unnecessary because the defendants in both circuits lost, albeit for different reasons. This argument relies on the notion that defendants who are barred from Caldwell litigation in the Fifth Circuit are treated the same way as defendants in the Tenth and Eleventh Circuits who may litigate retroactively-animated Caldwell claims. In fact, Tenth and Eleventh Circuit precedents demonstrate that this claim of similar treatment is mistaken.

I. THIS COURT'S REVIEW OF THE QUESTION WHETHER CALDWELL v. MISSISSIPPI IS A "NEW" RULE UNDER TEAGUE v. LANE IS NEEDED BECAUSE THE FIFTH AND TENTH CIRCUITS ARE IN CONFLICT ON THE QUESTION WHETHER PROCEDURAL DEFAULT "NOVEL CLAIM" DOCTRINE SHOULD BE TREATED AS DETERMINATIVE FOR TEAGUE'S "NEW" LAW ANALYSIS. REVIEW IS ALSO NEEDED BECAUSE THE SIXTH AND ELEVENTH CIRCUITS CONTINUE TO TREAT CALDWELL AS AN "OLD" RULE WHILE THE FIFTH AND TENTH CIRCUITS VIEW CALDWELL AS A "NEW" RULE UNDER TEAGUE.

There are four reasons why the State is wrong to argue that this Court's review of Robert Sawyer's case is "not necessary" because "there is no conflict among the circuits at this time" on the question whether Caldwell v. Mississippi is a "new" rule under Teague v. Lane's retroactivity doctrine. Brief in Opposition at 7. Caldwell, 472 U.S. 320 (1985); Teague, 109 S. Ct. 1060 (1989). First, the State is wrong to claim that the Eleventh Circuit has "resolved the issue of whether a Caldwell claim is a 'new rule' of law under Teague," because the Eleventh Circuit has not yet addressed this issue. Id. In pre-Teague cases, the Eleventh Circuit decided that Caldwell provided cause for procedural default under the "novel claim" excuse for "cause" for default outlined in Reed v. Ross, 468 U.S. 1, 15-16 (1984). See Brief in Opp., citing Eleventh Circuit cases at 6. However, neither the Eleventh Circuit nor this Court has held that Reed

analysis is a substitute for Teague analysis, or that procedural default "novel claim" doctrine creates precedent for non-retroactivity judgments. Indeed, this Court left open the question whether and how Teague analysis relates to "new claim" analysis in abuse of the writ doctrine, in remanding Zant v. Moore last year to the Eleventh Circuit, with instructions to consider its "new claim" holdings "in light of Teague v. Lane." Zant v. Moore, 109 S. Ct. 1518 (1989). See Moore v. Zant, 885 F.2d 1497 (11th Cir. 1989) (refraining from ruling on the Teague issue, and holding that abuse of the writ occurred with respect to claims not raised in first habeas petition).

Second, the State is wrong to argue that review is unnecessary because "no conflict" exists among the circuits concerning the status of Caldwell under Teague, because the Fifth and the Tenth Circuits are in conflict concerning the proper use of procedural default (or abuse of the writ) "novel claim" precedents in analyzing Caldwell's potential novelty under Teague. In Robert Sawyer's case, the Fifth Circuit majority found that "novel claim" precedents are not relevant to Teague analysis because "the meaning of 'newness' differs in writ abuse cases from its meaning in Teague cases." Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc), slip op. at 5550 (Cert. Petition Appendix at A-23). By contrast, the Tenth Circuit found that procedural default "novel claim" precedents are determinative in retroactivity decisions. See Hopkinson v. Shillinger, 888 F.2d 1286 (10th Cir. 1989) (en banc) (Petitioner's Intervening Authority Brief Appendix at A-9) ("a holding that a claim is . . . novel . . . thus establishing cause . . . must also mean that the claim was too novel [to be retroactive]").

Only this Court can resolve the important question whether pre-Teague circuit holdings that opened the doors for death row defendants to litigate "novel claims" may, in the post-Teague world, be used against defendants as proof of the non-retroactivity of the rulings whose benefits they seek to enjoy. Robert Sawyer anticipated the Caldwell ruling by raising his Caldwell claim, without procedural default, in state court before Caldwell was decided. This

Court should consider whether defendants in Robert Sawyer's situation must be barred from litigating their claims because defendants in other circuits were allowed, in the pre-Teague world, to bring Caldwell claims despite their own procedural defaults and failures to anticipate the Caldwell decision.

Third, the State is wrong to argue that this Court's review is unnecessary because there is "no conflict" in the circuits concerning the potential "new" law status of Caldwell under Teague, because the Sixth and the Eleventh Circuits are entertaining Caldwell claims on the merits, and implicitly treating Caldwell as "old" law under Teague, while the Fifth and the Tenth Circuits in Sawyer and Hopkinson found that Caldwell is "new" law under Teague. See, e.g., Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989) (denying Caldwell relief on the merits); Stano v. Dugger, 883 F.2d 900 (11th Cir. 1989) (denying Caldwell relief on the merits); see also Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989) (granting Caldwell relief on the merits). Robert Sawyer's case should be reviewed by this Court in order to insure that all death row defendants who seek Caldwell's retroactive application are treated alike in the post-Teague era.

Finally, the State's argument that review is unnecessary fails to take into account the central argument in Robert Sawyer's Petition for Certiorari, which is that the Fifth Circuit majority's "new" rule holding raises substantial and unresolved questions concerning the proper interpretation of Teague and Penry v. Lynaugh. Penry, 109 S. Ct. 2934 (1989). See Cert. Petition at 9-13. The State concedes that the Fifth and Tenth Circuits use different rationales for their "new" rule holdings. Brief in Opp. at 9. There is a substantial question presented here whether either one of these rationales is correct, considering the authorities that support the argument that Caldwell is an "old" segment of evolving Eighth Amendment law. See cases cited in excerpts from Robert Sawyer's Fifth Circuit Briefs, Appendix A-1-9. Given the different approaches to Teague analysis illustrated by the opinions in Sawyer and Hopkinson, it is clear that this Court's review of Robert Sawyer's case is necessary in order to provide

immediate guidance to lower courts concerning the proper application of the standards for "new" rule analysis set forth in Teague and Penry. Compare Coleman v. Saffle, No. 89-5737, cert. petition filed Oct. 2, 1989 (seeking review of Tenth Circuit holding that Booth v. Maryland, 482 U.S. 496 (1987) is a "new" rule under Teague).

II. THIS COURT'S REVIEW OF THE QUESTION WHETHER CALDWELL IS RETROACTIVE UNDER TEAGUE'S FUNDAMENTAL FAIRNESS EXCEPTION IS NEEDED BECAUSE ALL FIFTH CIRCUIT DEATH ROW DEFENDANTS ARE BARRED FROM CLAIMING THE RETROACTIVE BENEFITS OF CALDWELL, WHILE DEFENDANTS IN OTHER CIRCUITS CONTINUE TO ENJOY THE BENEFIT OF LITIGATING RETROACTIVE CALDWELL CLAIMS UNDER VARYING "MERITS" FORMULAS.

The State concedes that the Fifth and Tenth Circuits are now in conflict concerning the question whether Caldwell should be given retroactive effect as a rule that falls within the fundamental fairness exception of Teague. Brief in Opp. at 8. But the State argues that the conflict involves "a difference in analysis as opposed to a difference in results." Id. at 9. The State further claims that "the outcome for similarly situated defendants [seeking the retroactive benefits of Caldwell] would be the same" in the Fifth, Tenth, and Eleventh Circuits. Id. at 10. Precedents in these three circuits do not support this assertion.

First, a death row defendant in the Fifth Circuit is now barred from seeking the retroactive benefit of Caldwell, and may argue only that the prosecutor's false and misleading statements "so infected the trial with unfairness" as to deny due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)); see Sawyer, slip op. at 5553-5554 (Cert. Pet. App. at A-26-27). The same defendant in the Tenth Circuit is free to litigate a retroactive Caldwell claim, but must prove that the prosecutor's statements were so false and misleading as to create a "substantial possibility" of an effect on the verdict. Hopkinson, Pet. Int. Auth. Brief App. at A-21 (adopting the standard from Mills v. Maryland, 108 S. Ct. 1860 (1988), in lieu of Caldwell's "no effect" test). The

same defendant in the Eleventh Circuit is not only free to litigate a retroactive Caldwell claim, but is also entitled to relief under the standards specified in the Caldwell opinion itself, so that when a false and misleading prosecutorial statement about the non-finality of a jury's death verdict is made, and is not adequately "corrected" by the trial judge or the prosecutor, an effect on the jury is presumed to exist. See Mann v. Dugger, 844 F.2d 1446, 1456 (11th Cir. 1988) (not requiring proof of "effect" on the jury); see also Stano v. Dugger, 883 F.2d 900 (11th Cir. 1989) (allowing litigation of a retroactive Caldwell claim).

This proliferation of retroactivity and merits-analysis standards for Caldwell only illustrates the necessity for Supreme Court review in Robert Sawyer's case. The conflict that exists between Sawyer and Hopkinson not only creates different treatment for death row defendants who wish to receive retroactive application of Caldwell. This conflict also creates different treatment for defendants whose convictions became final after the Caldwell decision was rendered, who are entitled to its benefits per se under Teague. Robert Sawyer's case presents the opportunity to resolve several important and different conflicts among the circuits at the same time.

Finally, the State argues implicitly that the Fifth Circuit was wrong when it unanimously endorsed Caldwell's "no effect" test as the standard of review for valid Caldwell claims on the merits, and wrong when it unanimously rejected the State's claim that the Caldwell standard is identical to those of Darden v. Wainwright and Donnelly v. DeChristoforo. See Brief in Opp. at 11-17; see also Sawyer, slip op. at 5538-5539, 5541-5543 (Cert. Pet. App. at A-11-12, A-14-17). However, in urging this Court to deny review of a ruling which the State opposes, the State overlooks the fact that the Tenth Circuit's Hopkinson decision created a conflict in the circuits by rejecting the Fifth Circuit's position on the "no effect" test. The State's opposition to the Fifth Circuit's interpretation of Caldwell provides a further reason for this Court to grant review of Robert

Sawyer's case in order to resolve the circuit conflicts concerning the proper definition of Caldwell violations.[1]

It may be that this Court will decide to provide further guidance for lower courts by establishing more detailed standards for Teague's retroactivity rules in another death penalty case now pending before the Court, rather than decide to take review of the present case. If so, Robert Sawyer respectfully requests that this Court hold his case until such standards are provided, and then remand his case to the Fifth Circuit, with instructions for that court to reconsider its novel Teague rulings in light of the relevant retroactivity precedent in question decided this Term.

CONCLUSION

For the foregoing reasons, as well as the reasons described in the petition for certiorari, Robert Sawyer's petition for certiorari should be granted.

Respectfully submitted,

CATHERINE HANCOCK
Counsel of Record
ELIZABETH W. COLE
7031 Freret Street
New Orleans, Louisiana 70118
(504) 865-5949; 865-5153

January 3, 1990

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[1] The State correctly notes that the state trial court issued an unpublished opinion in this case. Brief in Opp. at 1. A reference to this opinion was omitted inadvertently from the Petition for Certiorari. See Cert. Petition at 5. The text of the Petition should be amended to read as follows:

> The state trial court denied the petition on the same day it was filed, without opinion. On appeal the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The case was submitted on the record and the trial court denied the petition in an unpublished opinion. On appeal the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The trial court denied the petition again at the close of the hearing without opinion, giving oral reasons.

It also should be noted that the State lists the Tulane University Law Clinic in its List of Parties, but the Clinic does not represent Robert Sawyer. His counsel are members of the Tulane law school faculty, and they are volunteer attorneys.

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CERTIFICATE OF SERVICE

I, Catherine Hancock, a member of the Bar of this Court, hereby certify that on this 3rd day of January, 1990, a copy of the Petitioner's Reply Brief in the above-entitled case was mailed, first-class postage prepaid, to William J. Guste, Attorney General of Louisiana, State Capitol Station, P.O. Box 44005, Baton Rouge, Louisiana 70804, and to Ms. Dorothy Pendergast, Office of the District Attorney, 24th Judicial District Court, New Courthouse Building, Gretna, Louisiana 70054, counsel for the respondent herein. I further certify that all parties required to be served have been served.

Catherine Hancock
7031 Freret Street
New Orleans, Louisiana 70118
(504) 865-5949
Counsel for Petitioner

APPENDIX TO PETITIONER'S REPLY BRIEF

[Excerpt from Robert Sawyer's Supplemental Brief on Teague v. Lane Issues in the U. S. Court of Appeals for the Fifth Circuit]

The Caldwell Court's judgment of the settled nature of its ruling is supported by the long-established tradition of state court decisions described in its opinion. One of the earliest state cases dates from 1877, when a Missouri Court reversed a death penalty verdict based on a misleading prosecutorial argument concerning appellate review. State v. Kring, 64 Mo. 591, 596 (Mo. App. 1877). The Kring Court found that such an argument was calculated to induce the jury to disregard its responsibility for a death verdict, and that even in the absence of an objection, the trial judge should have intervened to give prompt correction. Id. at 596. Many other state court rulings in capital cases between 1877 and 1985 created a blueprint both for Caldwell's holding, and for its multiple rationales. In capital cases, state courts uniformly condemned misleading,

uncorrected prosecutorial references to appellate review, reasoning that such arguments misled lay jurors concerning the powers of appellate courts and juries, lessened the jurors' sense of responsibility for a death verdict, distracted the jurors from their task of weighing evidence and deciding on punishment, interjected irrelevant factors into their exercise of discretion, and created a likelihood of prejudice in the form of a pro-death bias in their deliberations.

The fabric of the state court blueprint for Caldwell may be discerned in many capital cases. See, e.g., Wiley v. State, 449 So.2d 756, 762 (Miss. 1984) (remarks condemned, reversal required, remarks lessen individual juror's sense of awesome responsibility for fate of defendant, and give jurors false comfort that they have advisory role, when "all notions of justice" require jurors to appreciate the gravity of their decision); Williams v. State, 445 So.2d 798, 811-812 (Miss. 1984) (remarks condemned, reversal required, remarks give jury false comfort and lessen awesome responsibility); State v. Robinson, 421 So.2d 229, 233-234 (La. 1982) (remarks condemned, reversal required, remarks lessen jurors' awesome responsibility, divert attention from sentencing issue of appropriateness of death, mislead lay jurors about the powers of appellate courts, and interject irrelevant matters into the deliberations); State v. Willie, 410 So.2d 1019, 1033-1035 (La. 1982) (remarks condemned, reversal required, remarks diminish jurors' responsibility and sense of accountability); State v. Jones, 251 S.E.2d 425, 427-429 (N.C. 1979) (remarks condemned, reversal required, remarks will

be likely to result in jurors' reliance on the Supreme Court for ultimate determination of the sentence); State v. Gilbert, 258 S.E.2d 890, 894 (S.C. 1979) (remarks condemned, reversal required, remarks lessen jurors' responsibility); State v. Tyner, 258 S.E.2d 559, 565-566 (S.C. 1979) (remarks condemned, reversal required, remarks imply responsibility for death is lessened, and divert the jury from deciding the punishment on the evidence); Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977) (remarks condemned, reversal required); Fleming v. State, 240 S.E.2d 37, 40 (Ga. 1977) (remarks condemned, reversal required, remarks divert jury from basing verdict on evidence, suggest jurors' heavy burden can be passed on to appellate court, and have unusual potential for corrupting the sentencing process); State v. White, 211 S.E.2d 445, 450 (N.C. 1975) (remarks condemned, reversal required, remarks suggesting that jurors share responsibility with others for death verdict are prejudicial, remarks are intended to overcome natural reluctance to give a death verdict, lay jurors cannot understand the technicalities of the fact-or-law review distinction); Prevatte v. State, 214 S.E.2d 365, 367-368 (Ga. 1975) (remarks condemned, reversal required, remarks encouraged jury to take less than full responsibility for its awesome task, and remarks may have influenced the jury to give death when unbiased judgment would have given life, as jurors weigh imponderables in sentencing deliberations); People v. Morse, 388 P.2d 33, 43-44 (Cal. 1964) (trial judge's instruction about his power to reduce a death sentence is condemned, reversal required, remarks weaken jury's

sense of responsibility); State v. Mount, 152 A.2d 343, 352 (N.J. 1959) (trial judge's remarks about appellate review condemned, reversal required, remarks weaken jury's sense of obligation in performance of its duties, and deprive the defendant of a fair determination on the issue of life or death); Pait v. State, 112 So.2d 381, 384 (Fla. 1959) (remarks condemned, reversal required, remarks suggest that jury can disregard its responsibility, and unreviewable nature of death verdict makes remarks especially prejudicial); State v. Dockery, 77 S.E.2d 664, 668 (N.C. 1953) (remarks condemned, reversal required, remarks prejudiced the defendant's right to have the jury recommend life, and were calculated to induce the jury not to exercise its discretion to give a life sentence); State v. Hawley, 48 S.E.2d 35, 36 (N.C. 1948) (remarks condemned, reversal required, remarks tend to disconcert the jury in fairly deliberating and arriving at a just verdict); Pilley v. State, 25 So.2d 57, 59 (Ala. 1946) (remarks are condemned, because they lessened jurors' sense of responsibility, but no reversal required where judge gave immediate correction); People v. Johnson, 30 N.E.2d 465, 467 (N.Y. 1940) (remarks condemned, reversal required, remarks suggest jurors need not be greatly concerned about verdict); State v. Biggerstaff, 43 P. 709, 711 (Mont. 1896) (remarks were reprehensible, and calculated to cause jurors to be less cautious in weighing evidence and less mindful of duties, and would be grounds for reversal if issue were properly raised on appeal); Vaughn v. State, 24 S.W. 885, 889 (Ark. 1894) (remarks condemned, but no reversal where judge gave immediate correction).

[Excerpt from Robert Sawyer's Supplemental Reply Brief on Teague v. Lane Issues in the U. S. Court of Appeals for the Fifth Circuit]

I. THE "NO EFFECT" ANALYSIS USED IN CALDWELL WAS ENDORSED IN THE SUPREME COURT'S EIGHTH AMENDMENT RULINGS AND EMPLOYED BY STATE COURTS REVIEWING CALDWELL ERRORS IN THE PRE-CALDWELL ERA. THUS THE STATE CANNOT CLAIM THAT THE CALDWELL COURT EITHER FAILED TO APPLY SETTLED EIGHTH AMENDMENT PRINCIPLES TO THE CALDWELL PROBLEM, OR BROKE NEW GROUND BY ENDORSING THE PREVAILING STATE COURT SOLUTION FOR CALDWELL VIOLATIONS. CALDWELL'S ENTIRE FORMULA MUST BE GIVEN RETROACTIVE APPLICATION IN ROBERT SAWYER'S CASE.

The State properly concedes that Caldwell's ban on misleading prosecutorial argument about appellate review is not a "new rule," because its holding was "dictated by precedent," and broke no "new ground" under Teague v. Lane, 109 S. Ct. 1060, 1070 (1989). (State's Supp. Brief at 3 & 5, 4; see generally State's Supp. Brief at 3-6; accord, Robert Sawyer's Supp. Brief at 6-29.) However, the State asserts that Caldwell's "no effect" analysis does articulate a "new rule." (State's Supp. Brief at 7.) This assertion is contradicted by two bodies of law. First, the State chooses to ignore all the pre-Caldwell state court rulings which are cited in Robert Sawyer's Supplemental Brief. (See Robert Sawyer's Supp. Brief at 9-13, 20-28.) These rulings illustrate that state courts before Caldwell were using a "no effect" analysis in addressing the problem of uncorrected, misleading prosecutorial argument about appellate review. Second, the State fails to explain that the Eighth Amendment precedents upon which Caldwell relied, which are cited in the State's own brief, also employ a "no effect" analysis for Eighth Amendment violations that are found to pose a danger of unreliable death verdicts. In

light of these two bodies of law, Caldwell's entire holding must be given retroactive application to Robert Sawyer's case.

The Caldwell opinion reveals that the "no effect" analysis is a shorthand expression for a larger and more complex concept than the phrase itself implies. It is, in fact, a concept that expresses the Court's belief in the "presumed effect" of a particularly harmful Eighth Amendment violation upon death verdicts in all cases.

In Caldwell, for example, the Supreme Court found that there are many "specific reasons to fear substantial unreliability as well as bias in favor of death sentences" when misleading prosecutorial arguments about appellate review are made to a sentencing jury. Caldwell, 472 U.S. at 330. These reasons exist in all cases, and they create four dangers. As the Supreme Court put it, a misleading argument about appellate review creates "an intolerable danger of bias toward a death sentence" based on the jurors' desire to "send a message of disapproval" for the defendant's acts; it creates "the danger of a defendant's being executed in the absence of any determination that death was the appropriate punishment" when a death verdict is returned so that "delegation" to appellate courts can occur; it creates "an intolerable danger that the jury will in fact choose to minimize the importance of its role" because of the difficult and uncomfortable role the jurors have; and finally it creates a "chance" of the jury's reliance on the expertise of appellate courts that "will generate a bias toward returning a death

sentence [which] is simply too great." Id. at 331, 332, 333, id. Given these constant dangers of unreliability and pro-death bias that exist in all cases, the Caldwell Court refused to attempt to measure the actual impact of a misleading argument upon a death verdict in light of the totality of the evidence. Instead, some injurious impact will be presumed "[b]ecause we cannot say that [the argument] had no effect on the sentencing decision." Id. at 341.

This same "presumed effect" analysis was used by state courts reviewing Caldwell errors in capital cases in the era following Furman v. Georgia, 408 U.S. 238 (1972). (See, e.g., cases from Georgia, Louisiana, Mississippi, North Carolina, and South Carolina cited in Robert Sawyer's Supp. Brief at 10-11.) In some cases, the state courts actually expressed the "presumed effect" concept of Caldwell in so many words. See, e.g., State v. Robinson, 421 So.2d 229, 234 (La. 1982) ("we cannot say that the jury's sentencing decision was unaffected" by the misleading argument); State v. Jones, 251 S.E.2d 425, 429 (N.C. 1979) (any reference "which would have the effect of minimizing in the jury's minds their role" is precluded, as "such reference will, in all likelihood, result in the jury's reliance" on an appellate court); Prevatte v. State, 214 S.E.2d 365, 368 (Ga. 1975) (a reference to appellate review is likely to be cause for reversal of a death verdict because "in the weighing of imponderables it cannot be concluded that the jury were not influenced by such statements"). In other cases, the state courts simply applied the "presumed effect" concept by reversing death verdicts because

of bad arguments without inquiring into the actual impact of the argument upon the verdict in light of the totality of the evidence. (See, e.g., other state cases cited in Robert Sawyer's Supp. Brief at 10-11.) The same pattern of analysis is also evident in state court rulings on Caldwell error in the pre-Furman era, in both capital and non-capital cases. (See, e.g., state cases cited in Robert Sawyer's Supp. Brief at 11-13.) See Caldwell, 472 U.S. at 333-334 & n.4 & n.5 (citing state cases in support of its holding).

The State not only fails to take account of the old and widespread state court practice of employing a "no effect" or "presumed effect" analysis for Caldwell errors in the pre-Caldwell era. It also ignores the fact that the Eighth Amendment precedents upon which Caldwell relies, and which are cited in the State's brief, also employ the same analysis. (See State's Supp. Brief at 3-5.) See Caldwell, 420 U.S. at 329 & n.2, 330, 333, 340 (citing principles from Eighth Amendment precedents in support of its holding). For example, where a capital defendant actually presents relevant mitigating evidence to a trial judge who refuses to allow it to be considered in a sentencing hearing, the Supreme Court requires reversal of a death verdict, without making a calculation of the actual impact of this error on the verdict in light of the totality of the evidence. See Eddings v. Oklahoma, 455 U.S. 104, 114-117 (1982) (plurality opinion); Eddings, 455 U.S. 104, 117, 118-119 (O'Connor, J., concurring). Likewise where a sentencing judge relies on a presentencing report containing any material not disclosed to counsel, the

Supreme Court requires reversal of a death verdict without any inquiry into the nature of the undisclosed information or its actual impact on the verdict in light of the evidence. See Gardner v. Florida, 430 U.S. 349, 353-354, 357-362 (1977) (plurality opinion); Gardner, 430 U.S. 349, 362, 362-364 (White, J., concurring). See also Lockett v. Ohio, 438 U.S. 586, 606-609 (1978) (plurlaity opinion) (reversing death verdict because of improper statutory bar to consideration of relevant mitigating evidence, without regard to actual impact of such a bar on the verdict); Woodson v. North Carolina, 428 U.S. 280, 301-305 (1976) (plurality opinion).